TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1926

No. 207

ARNOLD J. REBSTOCK, UNITED STATES COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

MISSOURI PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 15, 1926
CERTIORARI GRANTED OCTOBER 18, 1926

(28074)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 507

ARNOLD J. HELLMICH, UNITED STATES COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

MISSOURI PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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A [Caption omitted.]

1 [Citation in usual form showing service on Claude M. Crosby, filed June 12, 1925, omitted in printing.]

2 In United States District Court, Eastern District of Missouri

No. 6695

MISSOURI PACIFIC RAILROAD COMPANY, PLAINTIFF

vs.

ARNOLD J. HELLMICH, UNITED STATES COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Writ of error

Filed June 12, 1925

The President of the United States to the honorable judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, greeting:

Because, in the record and proceedings, and in the rendition of the judgment in a cause which is in the district court before you, at the March term, 1925, wherein the Missouri Pacific Railroad Company was plaintiff and Arnold J. Hellmich, collector, was defendant, it is alleged manifest error hath happened to the injury and damage of the plaintiff, as by its complaint appears.

Therefore, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we do command you that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the 8th Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States Circuit Court of Appeals for the 8th Circuit on or before sixty days from date hereof, to the end that the records and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws of the United States should be done.

3 Witness the honorable Chas. B. Faris, judge of the District Court of the United States within and for the Eastern District of Missouri this 12th day of June, 1925.

Issued at office in the city of St. Louis with the seal of the district court and dated as aforesaid.

JAS. J. O'CONNOR,
Clerk, District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

[Seal U. S. Dist. Court, Eastern Division, East. Jud. Dist. of Mo.]

Allowed by C. B. Faris, judge.
[File endorsement omitted.]
[Return to writ of error omitted in printing.]
[Caption omitted.]

4 In United States District Court

[Title omitted.]

Petition filed March 28, 1924

The plaintiff states that it is a railroad corporation duly organized under the laws of the State of Missouri and is the owner of and engaged in operating divers lines of railroad situated in the States of Missouri, Arkansas, Kansas, Nebraska, Colorado, Illinois, and Louisiana, and of certain branch lines connected therewith, and its principal office is located in the city of St. Louis, Missouri.

That defendant, Arnold J. Hellmich, is the duly authorized acting collector of the revenue for the United States and has his office as such in the city of St. Louis and State of Missouri.

That the amount in controversy as set out in the petition exceeds the sum of three thousand dollars ($3,000.00), and plaintiff's right to sue for same against defendant arises under the laws of the United States, to wit, the revenue laws of the United States and the regulations adopted thereunder.

Plaintiff states that the Western Union Telegraph Company, a company duly organized under the law for the purpose of
5 operating various and divers lines of telegraph for the transmittal of telegraph messages for the public, for hire, also has and maintains an office in the city of St. Louis and divers other offices throughout the United States; that on or about the 24th day of October, 1911, a contract in writing was entered into between the Western Union Telegraph Company and the Missouri Pacific Railway Company and St. Louis Iron Mountain & Southern Railway Company, each of which railway companies were common carriers engaged in interstate commerce and subject to the acts of Congress to regulate interstate commerce, by which contract, in consideration of certain services to be rendered by such railway companies to the Western Union Telegraph Company and certain other considerations therein expressed, said telegraph company agreed to transmit over its telegraph lines for said two railway companies certain telegraphic messages without payment of charge other than that afforded by the

services rendered to the telegraph company by the railway companies, and the other considerations as set forth in said contract.

Plaintiff files with this petition and as an exhibit thereto, a printed copy of said contract and avers that the portions thereof, which are material to the cause of action hereinafter set forth and pleaded, are as follows, to wit:

"Fourth. The telegraph company agrees to perform such telegraphic service between points on its lines in the United States, either on or off the lines of the railroad covered by this agreement, as the railway companies may desire, for messages pertaining to their railroad business, to be authorized by frank permitting all classes of messages and telegraphic letters in public use on the lines of the telegraph company, to be issued to such officers and agents of the railway companies as may be designated by their presidents or general managers; and the railway companies agree to perform promptly such transportation and distribution service over their railroads covered by this agreement as the telegraph company may require for employes, supplies and material, whether for work or use along said railroads or beyond or off the lines of said railroads, and to furnish special trains, engines, crews, and equipment for distribution service, and outfit, boarding, and tool cars for work on the lines along said railroads, whenever required by the telegraph company. The transportation of employes to be authorized by passes to be issued by the railway companies on request of the superintendent or other authorized officer of the telegraph company.

6 Such service performed by either party for the other shall be charged for at its or their regular current telegraph rates, or through or local transportation rates, as the case may be, for the class of service rendered. Services performed by either party for the other for which there are no regular or published rates, and not otherwise provided for in this agreement, shall be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding twenty-five per cent (25%) of such cost. At the close of each contract year bills shall be rendered by each party to the other for all services performed by either party for the other during each year. If such bills therefor, rendered by either party to the other, exceed the sum of $75,000 in any contract year, the party receiving such service shall pay to the party rendering the same the amount of such excess, provided, that, in the event that each of the parties hereto is rendered bills for such services in excess of $75,000.00 in any contract year, the party in arrears shall pay to the other party the difference between the amounts of such accounts; and further provided that if the bills rendered by either party to the other for such services in any contract year do not exceed $75,000 there shall be no payment by either party to the other therefor.

Fifth. * * * At stations of the railway companies or either of them where the railway companies maintain either a telegraph

or telephone operator and where the number of sent paid and collect messages, whether sent by telegraph or telephone from any such station, are less than three thousand (3,000) a year, the operators and other employees of the railway companies, acting as the agents of the telegraph company, shall receive and transmit over the telegraph or telephone wires or circuits of either party, as may be most convenient, and shall deliver exclusively for the telegraph company, party hereto, such commercial or public messages as may be offered, and shall charge the tariff rates of the telegraph company thereof, and shall render to the telegraph company monthly statements of such business and full accounts of all receipts therefrom, and shall pay all of such receipts to the telegraph company in such manner and at such times as it may direct. The railway companies, or either of them, shall not be held liable for receipts from commercial or public telegraph business not paid over to the telegraph company by said railroad employes.

Said operators and employees shall not, without the consent
7 of the telegraph company, transmit over the wires of either party hereto any free messages except those on the railway companies' business, and concerning all business of the telegraph company, whether paid or free, and whether sent by telegraph or telephone, shall conform to all rules, regulations, and orders of the telegraph company applicable thereto; provided, however, that such employees shall not be required to deliver commercial or public messages when it will interfere with their railroad duties, but all reasonable attention shall be given by such employes to the prompt delivery of such messages; and the telegraph company, when in its opinion it is necessary, shall employ messengers, whose wages shall be divided between the parties hereto according to the division of the gross receipts at such offices."

Plaintiff further states that on or about the 1st day of June, 1917, the plaintiff, Missouri Pacific Railroad Company, acquired and came into possession of the railroad property previously owned and operated by the Missouri Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company, by virtue of a sale of said properties in certain foreclosure proceedings in the United States District Court of the city of St. Louis, and that thereafter this plaintiff assumed the obligations imposed on said former railway companies under the contract theretofore entered into with the Western Union Telegraph Company and succeeded to all the rights of said former railway companies under said contract with said telegraph company, including the rights set forth in said contract as to the transmission of certain telegraphic messages without charge other than the services and considerations provided for in said contract, and since plaintiff purchased the properties formerly belonging to said railway companies above named plaintiff has rendered said telegraph company the services required in said contract to be rendered to said company.

Plaintiff states that among the provisions enacted by the Congress of the United States in the revenue act of 1918 relative to the collection of certain taxes were the following:

"Src. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the revenue act of 1917.

* * * * * * *

8 (f) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents; provided, that only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and

(G) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct by a common carrier or telegraph or telephone company of its business as such:

* * * * * * *

Src. 501. (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * * * *

(c) The taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. In case a carrier (other than a pipe line) principally engaged in rendering transportation services or facilities for hire does not, because of its ownership of the goods transported, or for any other reasons, receive the amount which as a carrier it would otherwise charge, such carrier shall pay a tax equivalent to the tax which would be imposed upon the transportation of such goods if the carrier received payment for such transportation, such tax, if it can not be computed from the actual rates or tariffs of the carrier, to be computed on the basis of the rates or tariffs of other carriers for like services as determined by the commissioner. In the case of any carrier (other than a pipe line) the principal business of which is to transport goods belonging to it on its own account and which only incidentally renders services for hire, the tax shall apply to such services or facilities only as are actually rendered by it for hire, nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transportation of any commodity which is necessary for the use of the carrier in the conduct of its business as such

9 and is intended to be so used or has been so used; or (2)

upon the transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier which is also a part of the same system.

* * * * * * *

Sec. 502. That each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under subdivision (c) or (d) of section 501 to the collector of the district in which the principal office or place of business is located.

* * * * * * *

Any person making a refund of any payment upon which tax is collected under this section may repay therewith the amount of the tax collected on such payment; and the amount so repaid may be credited against amounts included in any subsequent monthly return.

The returns required under this section shall contain such information and be made at such times and in such manner as the commissioner, with the approval of the Secretary, may by regulation prescribe.

The tax shall, without assessment by the commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due.

Plaintiff further states that thereafter the Commissioner of Internal Revenue of the United States claiming the right and authority so to do, established and promulgated certain rules and regulations relative to the collection of taxes under the revenue act of Congress and particularly the following, known as Article IX of Regulations numbered 57, to wit:

"Messages transmitted under contract.—Where by contract a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performances of services, to transmit messages on frank, such messages are subject to the tax imposed by this section (500-f of the act). The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The questions as to whether such messages relate to the operation of the business of the common carrier and whether they are 'on-line' or 'off-line' are immaterial. Thus a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business 'free' and all such messages over its lines off the railroad line 'free' to an amount not exceeding ten thousand dollars ($10,000.00) per year calculated at its regular rates, and all messages over that amount at half rates in consideration of services to

be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages whether 'on line' or 'off line' and whether 'free' or at half rates, are subject to the tax provided by this section (500-f) of the act. The tax must be computed, collected, and paid upon each such message."

Plaintiff avers that defendant herein as collector of the revenue of the United States acting under and by virtue of the regulations promulgated and adopted by the Commissioner of Internal Revenue of the United States, about the —— day of May, 1923, presented to the plaintiff a bill covering the amount claimed to be due from plaintiff on account of franked Western Union messages transmitted during the period from March, 1920, to July, 1922, inclusive, and which messages were sent under and pursuant to the contract with the Western Union Telegraph Company of October 24, 1911, which bill and claim aggregated the sum of ten thousand thirty-six dollars and eighty-five cents ($10,036.85); that thereafter, about the 23rd day of May, 1923, plaintiff, under protest, paid said demand of defendant on account of said messages, endorsing on its voucher of payment the following words:

"These taxes are paid under protest for the reason that Article IX of Regulations 57 is deemed to be unlawful and we expressly reserve the right to file suit to recover back this payment."

Plaintiff avers that demand, exaction, and collection of said sum of ten thousand thirty-six dollars and eighty-five cents ($10,036.85) covering messages for the period above named was unlawful
11 and unauthorized for the reason that under the provisions of the act of Congress referred to in this petition and under the provisions of the contract between the Western Union Telegraph Company and said railway companies, neither said telegraph company nor the defendant as the representative of the Government was entitled to recover and collect from plaintiff said amount of money and further, because under the provisions of sections 500, 501, and 502 of the revenue act passed by Congress in the year 1918, this plaintiff was only required to pay a tax to the Government on telegraphic messages on which transmission charges were collected.

Plaintiff further says that the regulations by the Commissioner of Internal Revenue of the United States and designated as Article IX, Regulations 57, wherein is asserted the right to collect taxes on franked or free telegraphic messages, are unauthorized and void and constitute no basis for the claim set up by defendant and on which plaintiff was required to pay the sum of money above set forth.

This plaintiff further says that said regulations of the Commissioner of Internal Revenue are purely departmental regulations and not authorized by the provisions of sections 500, 501, and 502 of the United States revenue act passed by Congress in the year 1918, and such departmental regulations furnish no basis for the exaction of said sum of money.

Plaintiff further says that after said payment it, in due form as authorized by the laws of Congress in such cases made and provided,

made its demand in writing on the Commissioner of Internal Revenue for the refund of such sum so paid by it as aforesaid; that said commissioner declined and refused to refund said sum of money to plaintiff.

Plaintiff says that under date of July 30, 1923, the Commissioner of Internal Revenue at Washington, D. C., advised the vice president and general solicitor of plaintiff as follows:

"Receipt is acknowledged of your letter dated July 12, 1923, accompanies by application for refund of a total of $14,792.95, taxes on Western Union frank messages. The items submitted are as follows:

"Paid May 23, 1923, for taxes on messages from March, 1920, to July, 1922	$10,036.85
"Paid June 28, 1923, for messages from August, 1922, to January, 1923, inclusive	6,756.10

12 "You are advised that the claim will date from July 16, 1923, the date of receipt of your letter and application in this office."

Plaintiff further states that thereafter under date of September 13, 1923, there was mailed to the United States Commissioner of Internal Revenue at Washington, D. C., duly executed, the form prescribed by said commissioner for refund of the taxes paid by plaintiff as set out in this petition; that said appeal to said commissioner for refund was duly received by him, and that he has rendered no decision or made no response to such appeal by the plaintiff for more than six months since the same was presented to him.

Wherefore plaintiff prays judgment against defendant for the sum of ten thousand thirty-six dollars and eighty-five cents ($10,036.85), together with its costs in this behalf expended.

II

For a second and further cause of action plaintiff, reaffirming and reasserting all the paragraphs hereinbefore pleaded in this petition which are applicable and material, avers that about the first day of June, 1923, defendant, as collector of internal revenue of the United States, made another and further demand upon the plaintiff for the amount of taxes claimed to be due the Government on franked Western Union messages transmitted during the period of from August, 1922, to January, 1923, inclusive, and which messages were sent under and pursuant to contract with the Western Union Telegraph Company of October 24, 1911, as follows:

August,	1922	$647.62
September,	"	604.55
October,	"	885.30
November,	"	797.25
December,	"	937.89
January,	1923	883.60
Making a total of		$4,756.10

That thereafter, about the 28th day of June, 1923, the plaintiff, under protest, paid said sum endorsing upon its voucher of payment the following words:

"These taxes are paid under protest for the reason that Article IX of Regulations 57 is deemed by us to be unlawful, and we expressly reserve the right to file suit to recover back this payment."

13 Plaintiff reaffirms as to the payment last above-mentioned all of the allegations set forth in the first count of this petition as to the illegal and unauthorized collection of said sum of four thousand seven hundred fifty-six dollars and ten cents ($4,756.10) and avers that immediately after said payment, which was made under protest, it filed its claim with the Commissioner of Internal Revenue of the United States for a refund of said amount so paid and said Commissioner of Internal Revenue declined and refused to make or authorize such refund.

Plaintiff says that under date of July 30, 1923, the Commissioner of Internal Revenue at Washington, D. C., advised the vice president and general solicitor of plaintiff as follows:

"Receipt is acknowledged of your letter dated July 12, 1923, accompanied by application for refund of a total of $14,792.95, taxes on Western Union frank messages. The items submitted are as follows:

"Paid May 23, 1923, for taxes on messages from March, 1920, to July, 1922	$10,036.85
"Paid June 28, 1923, for messages from August, 1922, to January, 1923, inclusive	4,756.10

"You are advised that the claim will date from July 16, 1923, the date of receipt of your letter and application in this office."

Plaintiff further states that thereafter under date of September 13, 1923, there was mailed to the United States Commissioner of Internal Revenue at Washington, D. C., duly executed, the form prescribed by said commissioner for refund of the taxes paid by plaintiff as set out in this petition; that said appeal to said commissioner for refund was duly received by him and that he has rendered no decision or made no response to such appeal by the plaintiff for more than six months since the same was presented to him.

Wherefore plaintiff prays judgment against defendant for the sum of four thousand seven hundred fifty-six dollars and ten cents ($4,756.10), together with its costs in this behalf expended.

JAMES F. GREEN,
M. U. HAYDEN,
Attorneys for Plaintiff.

14 In United States District Court

Record entries

December 30, 1924

Now on this day comes plaintiff in the above-entitled cause by its attorney, and comes also defendant by the United States district

attorney for the Eastern Judicial District of Missouri; whereupon said defendant by leave of court files herein his answer. And now said parties also by leave of court file herein their stipulation waiving a trial by jury of the issues herein joined, as well as their joint stipulation and agreed statement of facts; whereupon the introduction of testimony in behalf of plaintiff on the trial of said cause before the court is commenced and concluded, and such cause submitted to the court on the evidence adduced by plaintiff and the agreed statement of facts as aforesaid.

In United States District Court

Answer

Filed Dec. 30, 1924

Comes now Arnold J. Hellmich, collector of internal revenue for the first district of Missouri, by his attorney, Claude M. Crooks, assistant United States attorney, and for answer to plaintiff's petition filed herein, denies each and every allegation contained therein.

Wherefore having fully answered, defendant prays to go hence with his costs.

(Signed) CLAUDE M. CROOKS,
Assistant United States Attorney,
Attorney for Defendant.

In United States District Court

Stipulation waiving jury

Filed Dec. 30, 1924

It is hereby stipulated by and between the parties to the above-entitled cause, that a jury be waived and that the cause be tried by the court.

(Signed) EDWARD J. WHITE,
" JAMES F. GREEN,
" M. W. HAYDEN,
Attorneys for Plaintiff.
(Signed) CLAUDE M. CROOKS,
" CHAS. F. KEMPER,
Attorneys for Defendant.

15 In United States District Court

Stipulation of agreed statement of facts

Filed Dec. 30, 1924

It is hereby stipulated that the above-entitled cause shall be submitted to the court for decision on the following agreed statement of facts, either party having the privilege to offer additional evidence if desiring to do so, to wit:

The Western Union Telegraph Company, a company duly organized under the law for the purpose of operating lines of telegraph for the transmittal of telegraphic messages, on the 24th day of October, 1911, entered into a contract in writing with the Missouri Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company.

The contract, which is quite lengthy, contains the following paragraphs, which it is agreed are material to the questions involved in this case:

"Fourth. The telegraph company agrees to perform such telegraphic service between points on its lines in the United States, either on or off the lines of the railroads covered by this agreement, as the railway companies may desire, for messages pertaining to their railroad business, to be authorized by franks permitting all classes of messages and telegraphic letters in public use on the lines of the telegraph company, to be issued to such officers and agents of the railway companies as may be designated by their presidents or general managers; and the railway companies agree to perform promptly such transportation and distribution service over their railroads covered by this agreement as the telegraph company may require for its employes, supplies, and material, whether for work or use along said railroads or beyond or off the lines of said railroads, and to furnish special trains, engines, crews, and equipment for distribution service, and outfit, boarding and tool cars for work on the lines along said railroads, whenever required by the telegraph company. The transportation of employes to be authorized by passes to be issued by the railway companies on request of the superintendent or other authorized officer of the telegraph company.

"Such service performed by either party for the other shall be charged for at its or their regular current telegraph rates, or through or local transportation rates, as the case may be, for the class of services rendered. Services performed by either party for the other
16 for which there are no regular or published rates, and not otherwise provided for in this agreement, shall be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding twenty-five per cent (25%) of such cost. At the close of each contract year bills shall be rendered by each party to the other for all services performed by either party for the other during such year. If such bills therefor, rendered by either party to the other, exceed the sum of $75,000 in any contract year, the party receiving such service shall pay to the party rendering the same the amount of such excess, provided, that, in the event that each of the parties hereto is rendered bills for such services in excess of $75,000 in any contract year, the party in arrears shall pay to the other party the difference between the amounts of such accounts; and further provided that if the bills rendered by either party to the other for such services in any contract year do not exceed $75,000 there shall be no payment by either party to the other therefor.

"Fifth. * * * At stations of the railway companies or either of them where the railway companies maintain either a telegraph or telephone operator, and where the number of send paid and collect messages, whether sent by telegraph or telephone, from any such station are less than three thousand (3,000) a year, the operators and other employes of the railway companies, acting as the agents of the telegraph company, shall receive and transmit over the telegraph or telephone wires or circuits of either party, as may be most convenient, and shall deliver exclusively for the telegraph company, party hereto, such commercial or public messages as may be offered, and shall charge the tariff rates of the telegraph company therefor, and shall render to the telegraph company monthly statements of such business and full accounts of all receipts therefrom, and shall pay all of such receipts to the telegraph company in such manner and at such times as it may direct. The railway companies or either of them shall not be held liable for receipts from commercial or public telegraph business not paid over to the telegraph company by said railroad employes.

"Said operators and employes shall not, without the consent of the telegraph company, transmit over the wires of either party hereto any free messages except those on the railway companies' business, and concerning all business of the telegraph company, whether paid or free, and whether sent by telegraph or telephone, shall
17 conform to all rules, regulations, and orders of the telegraph company applicable thereto; provided, however, that such employes shall not be required to deliver commercial or public messages when it will interfere with their railroad duties, but all reasonable attention shall be given by such employes to the prompt delivery of such messages; and the telegraph company, when in its opinion it is necessary, shall employ messengers, whose wages shall be divided between the parties hereto according to the division of the gross receipts at such offices.

"The telegraph company agrees to pay to the railway companies, as soon as practicable after the close of each month, ten (10) per centum of the gross cash receipts (excluding tolls on the railway companies' messages) received by the operators of the railway companies, acting for the telegraph company as hereinbefore provided, from commercial or public messages at offices in their stations, except that tolls on ocean cable messages and tolls or charges of other companies shall not be included in the division of such gross receipts, but shall be retained in full by the telegraph company.

"It is further agreed, that about the first day of June, 1917, the plaintiff in this cause, the Missouri Pacific Railroad Company, duly acquired and came into possession of the railroad properties previously owned and operated by the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company by virtue of a sale of said properties in receivership proceedings in the United States District Court of the city of St. Louis, and that thereafter the plaintiff in this cause assumed the obligations

imposed on said former railway companies under the contract entered into between them and the Western Union Telegraph Company, including the rights set forth in said contract as to the transmission of telegraph messages, and since the Missouri Pacific Railroad Company acquired the properties formerly belonging to the railway companies named in said contract the plaintiff has rendered the telegraph company the services required by the contract."

The provisions enacted by the Congress of the United States in the revenue act of 1918 relative to the collection of taxes on account of the transmission of telegraphic messages are as follows:

18 "Sec. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the revenue act of 1917—

* * * * * * *

"(f) In the case of each telegraph, telephone, cable, or radio dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents: *Provided*, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and

"(g) A tax equivalent to 10 per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit special service furnished after such date, this subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the collection and dissemination of news through the public press, or (2) in the conduct by a common carrier or telegraph or telephone company, of its business as such;

* * * * * * *

"Section 501. (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * * * *

"(c) The taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. In case a carrier (other than a pipe line) principally engaged in rendering transportation services or facilities for hire does not, because of its ownership of the goods transported, or for any other reasons, receive the amount which as a carrier it would otherwise charge, such carrier shall pay a tax equivalent to the tax which would be imposed upon the transportation of such goods if the carrier received payment for such transportation, such tax, if it cannot be computed from the actual rates or tariffs of the carrier, to be computed on the basis of the rates or tariffs of other carriers for like services as determined by the commissioner. In the case of any carrier

19 (other than a pipe line) the principal business of which is to

transport goods belonging to it on its own account and which only incidentally renders service for hire, the tax shall apply to such services or facilities only as are actually rendered by it for hire. Nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transportation of any commodity which is necessary for the use of the carrier in the conduct of its business as such and is intended to be so used or has been so used; or (2) upon the transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier which is also a part of the same system.

* * * * * * *

"Sec. 502. That each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under subdivision (c) or (d) of section 501 to the collector of the district in which the principal office or place of business is located.

* * * * * * *

"Any person making a refund of any payment upon which tax is collected under this section may repay therewith the amount of the tax collected on such payment; and the amount so paid may be credited against amounts included in any subsequent monthly return.

"The returns required under this section shall contain such information and be made at such times and in such manner as the commissioner, with the approval of the Secretary, may by regulation prescribe.

"The tax shall, without assessment by the commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum, together with interest at the rate of 1 per centum for each full month, from the time when the tax became due."

After the enactment of said revenue act the Commissioner of Internal Revenue of the United States promulgated certain rules and regulations adopted by him relative to the collection of taxes under said revenue act and particularly the following, known as Article IX of regulations numbered 57, to wit:

"Messages transmitted under contract.—Where by contract a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section (500-f of the act). The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariffs of the transmitting carrier. The questions as to whether such messages relate to the operation of the business of the common carrier and whether they are 'on-line' or 'off-line' are immaterial. Thus a

telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business 'free' and all such messages over its lines off the railroad line 'free,' to an amount not exceeding ten thousand dollars ($10,000.00) per year calculated at its regular rates, and all messages over that amount at half rates in consideration of services to be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages, whether 'on-line' or 'off-line' and whether 'free' or at half rates, are subject to the tax provided by this section (500-f) of the act. The tax must be computed, collected, and paid upon each such message."

It is further agreed that the defendant as collector of internal revenue of the United States for the district, including the city of St. Louis, about the —— day of May, 1923, presented to the Missouri Pacific Railroad Company a bill for the amount of taxes referred to in the first count of the petition, to wit, ten thousand and thirty-six dollars and eighty-five cents ($10,036.85) claimed to be due from the railroad company on account of Western Union telegraphic messages transmitted during the period from March, 1920, to July, 1922, which messages were sent and transmitted under and in pursuance of the contract between the Western Union Telegraph Company and the Missouri Pacific Railroad Company, as successor of the two railway companies named in the contract of October 24, 1911; that plaintiff paid said demand of defendant on account of said messages, endorsing on its voucher of payment the following words:

"These taxes are paid under protest for the reason that Article IX of Regulations 57 is deemed to be unlawful, and we
21 expressly reserve the right to file suit to recover back this payment."

That thereafter, on the first day of June, 1923, defendant as said collector of internal revenue made a further demand upon the plaintiff for the amount of taxes claimed to be due the Government on franked Western Union messages transmitted during the period from August, 1922, to January, 1923, which claim is itemized by months in the second count of the petition in the cause and aggregates the sum of four thousand seven hundred fifty-six dollars & ten cents ($4,756.10), and that thereafter, about the 28th of June, 1923, plaintiff also under protest paid said last-named sum, endorsing upon its voucher of payment the following words:

"These taxes are paid under protest for the reason that Article IX of Regulations 57 is deemed by us to be unlawful and we expressly reserve the right to file suit to recover back this payment."

Plaintiff also under date of July 12, 1923, made a demand for refund of the amount paid.

That under date of July 30, 1923, the Commissioner of Internal Revenue at Washington, D. C., advised the vice president & general solicitor of the Missouri Pacific Railroad Company as follows:

"Receipt is acknowledged of your letter dated July 12, 1923, accompanied by application for refund of a total of $14,792.92, taxes on Western Union frank messages. The items submitted are as follows:

"Paid May 23, 1923, for taxes on messages from March, 1920, to July, 1922	$10,036.85
"Paid June 28, 1923, for messages from August, 1922, to January, 1923, inclusive	4,756.10

"You are advised that the claim will date from July 16, 1923, the date of receipt of your letter and application in this office."

The term "franked message" as herein used means messages transmitted for the benefit of the carrier under the contract.

That thereafter, under date of September 13, 1923, there was mailed by plaintiff to the United States Commissioner of
22 Internal Revenue at Washington, D. C., duly executed, the form prescribed by said commissioner for claim for refund of the taxes paid by the plaintiff as set out in the two counts of its petition in this cause, aggregating the sum of fourteen thousand seven hundred ninety-two and 95/100 dollars ($14,792.95); that said appeal of plaintiff to said commissioner for refund was duly received by him and that he has failed to render any decision or make any response to such appeal for refund made by the railroad company for more than six (6) months after the same was presented to him; that this suit was filed March 28, 1924.

It is further agreed, that if the court finds for the plaintiff in the above case judgment should be rendered in its favor against the defendant for the aggregate of the sums claimed in the two counts of plaintiff's petition, to wit, the sum of fourteen thousand seven hundred ninety-two and 95/100 dollars ($14,792.95).

(Signed) EDWARD J. WHITE,
" M. U. HAYDEN,
" JAMES F. GREEN,
Attorneys for Plaintiff.

(Signed) CLAUDE M. CROOKS,
" CHAS. F. KENDLER,
Attorneys for Defendant.

In United States District Court

Judgment

April 4, 1925

This cause having been heretofore submitted to the court on stipulation of parties waiving a trial by jury, and the court having considered the issues herein joined, and being fully advised in the premises, doth find such issues in favor of defendant and against plaintiff. It is, therefore, ordered and adjudged that plaintiff take

nothing by its suit in this behalf, and that defendant go hence without day and recover of said plaintiff his costs and charges herein expended, for all of which costs and charges let execution issue upon praecipe of said United States district attorney.

In United States District Court

Motion for a new trial

Filed April 8, 1925

Now comes the plaintiff in the above-entitled cause and moves the court to set aside its findings and judgment in the
23 above-entitled cause and to grant a new trial of the issues therein for the following reasons:

1. Because the finding and judgment of the court are contrary to the evidence submitted in the cause.

2. Because under the stipulation and agreed statement of facts and the additional testimony offered on the part of plaintiff the finding and judgment of the court should have been in favor of the plaintiff and against the defendant.

3. Because under the law and the evidence submitted to the court the plaintiff was entitled to recover.

4. Because the court erred in rendering judgment for defendant on the facts as found and stated by the court in its opinion delivered in the cause.

(Signed) EDWARD J. WHITE,
M. U. HAYDEN,
JAMES F. GREEN,
Attorneys for Plaintiff.

In United States District Court

Order overruling motion for new trial

June 12, 1925

Now on this day come the parties in the above entitled cause and submit to the court the motion of plaintiff for a new trial herein; and the court, having considered such motion and being fully advised in the premises, doth order that said motion be, and the same is hereby, overruled.

And now plaintiff files and presents herein its petition praying for the allowance of a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment heretofore entered herein against it, together with its assignment of errors on such proposed writ of error; upon consideration whereof it is ordered that a writ of error be, and it is hereby, allowed plaintiff

as prayed upon its giving bond for costs in the sum of five hundred dollars. And now plaintiff presents such bond for costs in the sum of five hundred ($500.00) dollars, which bond is duly approved and filed, and a citation issued and filed, citing and admonishing defendant to be and appear in said United States Circuit Court of *Appeals within sixty days from and after this date.*

24 And upon application of said plaintiff it is ordered that it be, and is hereby, granted sixty days within which to file its bill of exceptions.

In United States District Court

Petition for writ of error

Filed June 12th, 1925

Now comes the above-named plaintiff, Missouri Pacific Railroad Company, and shows to the court that on the 4th day of April, 1925, in this court, a judgment was rendered in the above-entitled cause in favor of the defendant; that on the 8th day of April, 1925, plaintiff filed its motion praying the court to set aside its findings and judgment and to grant plaintiff a new trial in said cause for the reasons assigned in its said motion; that said motion for a new trial was duly submitted to the court and on the 12th day of June, 1925, was overruled and final judgment entered for defendant, and plaintiff avers that in the trial of said cause and the judgment entered therein certain errors were committed to the prejudice and injury of the plaintiff, all of which appear in detail in plaintiff's assignment of errors, which is filed in this cause with this petition for writ of error.

Wherefore, plaintiff prays that a writ of error may issue in its behalf, returnable to the United States Circuit Court of Appeals for the 8th District, for the correction of the errors so complained of and for the reversal of the judgment entered in said cause; that a citation be issued by the court directed to defendant and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the United States circuit court of appeals, and for such further order as may be proper in the premises.

(Signed) MINT U. HAYDEN,
EDW. J. WHITE,
JAMES F. GREEN,
Attorneys for Plaintiff.

To the clerk of this court:

The above petition is granted; let the writ issue as prayed.

_____.
Judge.

In United States District Court

Assignment of errors

Filed June 12, 1925

Now comes the plaintiff in the above cause and presents to the court its assignment of errors, which it alleges were committed in the trial and proceedings in the above cause to its prejudice and injury, as follows:

I

That the court erred in its opinion and judgment in holding that upon the agreed statement of facts which was filed in the cause the judgment should be for defendant.

II

That the court erred in finding that under the stipulation and agreement of the parties as to the facts and the additional evidence offered on the part of plaintiff, that plaintiff was not entitled to recover the amount sued for in its petition, as against defendant.

III

That the court erred in its oral opinion and judgment entered in the cause in holding that under the provisions of the revenue act passed by Congress, known as the "revenue act of 1918," plaintiff was not entitled to recover from defendant the amount sued for in its petition and which it had theretofore paid under protest to defendant.

IV

That the court erred in holding that, under the agreed statement of facts submitted to the court and the additional evidence offered on part of plaintiff, the plaintiff was liable to the United States for the payment of taxes which were sued for in this cause.

V

That under the stipulation as to the facts and the additional evidence offered on part of plaintiff the judgment in the cause should have been for the plaintiff and not for defendant.

VI

That the court erred in overruling the motion for new trial filed by the plaintiff in said cause.

Wherefore, because of the errors hereinabove assigned, plaintiff prays that the judgment entered by the district court in the above cause be reversed and set aside.

(Signed) EDW. J. WHITE,
M. U. HAYDEN,
JAMES F. GREEN,
Attorneys for plaintiff.

26 [Bond on writ of error for $500.00, approved and filed June 12, 1925, omitted in printing.]

27 In United States District Court

Record entry

July 9, 1925

Now on this day comes plaintiff in the above-entitled cause and presents herein its bill of exceptions, which bill of exceptions is duly allowed, signed, and filed.

In United States District Court

Bill of exceptions

Filed July 9, 1925

CAPTION

Be it remembered: That upon the trial of this cause during the September term, A. D. 1924, of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, on the thirtieth day of December, 1924, before the honorable Charles B. Faris (a jury having been waived), the following proceedings were had:

APPEARANCES OF COUNSEL

Mr. James F. Green, Mr. Edward J. White, Mr. M. U. Hayden, for plaintiff.

Mr. Claud M. Crooks, Mr. Charles F. Hendler, for defendant.

COLLOQUY BETWEEN COURT AND COUNSEL

The COURT. Has a stipulation been filed waiving a jury?

Mr. GREEN. Yes, your honor.

The COURT. Very well; the case is taken up and submitted to the court, a jury having been waived.

You may state what it is about, Judge Green, or read your petition.

Mr. GREEN. The petition is quite lengthy, your honor, and as considerable portions of it will be read to your honor later on, when

the stipulation as to the facts is offered in evidence. I think that probably I can save time by stating generally the character of the action.

The COURT. Very well; take your own course.

(At this point counsel for plaintiff made his opening statement to the court.)

Mr. CROOKS. The answer is simply a general denial of the petition, if the court please.

28 Thereupon the plaintiff, to sustain the issues in its behalf, offered the following evidence:

Mr. GREEN. Now, for the purpose of the trial of the case, your honor, the parties have agreed on the following stipulation as to facts, which is duly signed, and which I suppose your honor will desire to have read pretty much in full.

Mr. WHITE. I think perhaps the court might like to see a copy of it, so I will hand you this copy.

Mr. GREEN (reading).

[Stipulation of facts omitted; printed side page, ante.]

35 The stipulation is duly signed by counsel, and is offered in evidence.

The COURT. Very well; consider it in.

F. P. JOHNSON, a witness of lawful age, being duly produced, sworn, and examined, testified in behalf of plaintiff, as follows:

Direct examination by Mr. WHITE:

Q. Your name is F. P. Johnson?—A. Yes, sir.

Q. You are the general auditor of the Missouri Pacific Railroad?—A. I am.

Q. How long have you been engaged in the avocation of railroading, Mr. Johnson?—A. Thirty-six years.

Q. Thirty-six years?—A. Yes, sir.

Q. How long have you been employed by the Missouri Pacific Railroad Company?—A. Thirty-six years.

Q. As general auditor of the Missouri Pacific Railroad Company, are the different income taxes for the current years audited and the disbursements authorized to cover them under your supervision?—A. Yes, sir.

36 Q. Did you as general auditor of the Missouri Pacific Railroad Company, during the years from 1920 to January 1, 1923, audit and pass for voucher the bills for income taxes due the Federal Government and war profit taxes?—A. Yes, sir.

Q. As general auditor of the Missouri Pacific Railroad Company, have you made, in line with the performance of your duties, a study of the regulations of the Commissioner of Internal Revenue?—A. Yes, sir.

Q. With reference to the war profit tax, as applicable to commodities of transportation?

Mr. HENDLER. If the court please, I have not heretofore interposed an objection to questions relating to income taxes and war profit

taxes, supposing that it was merely introductory to something else, but I do not see how we are concerned here, in a case involving only transmission taxes, with any questions in regard to income or excess profit taxes.

Mr. WHITE. That objection is perhaps well taken, your honor.

The COURT. Oh, yes; but I will hear it. The objection will be overruled.

Mr. WHITE (to the witness). You may answer, Mr. Johnson.

A. I have.

Q. Have you with you, Mr. Johnson, the regulation of the Commissioner of Internal Revenue, with reference to Federal taxes due upon transportation of a common carrier, including exceptions mentioned in the revenue law, section 500, and subsequent sections?—A. Yes, sir.

Q. Will you produce that and let me have it marked as an exhibit?

The COURT. Really, gentlemen, it is not a question here as to those regulations, nor a question as to the right of the commissioner to make them, but it is a question whether the law means what the commissioner has said that it means. It is a question directed to this court, and to nobody else. Clearly, the commissioner could not make a regulation in a——

Mr. WHITE. No; your honor has held that in another case. I just want to get this in the record.

Q. Mr. Johnson, what is the practice——

57 Mr. CROOKS. I think we have all this in the stipulation, or the portion——

Mr. WHITE. Regulation No. 49 is not in the stipulation.

The COURT. The commissioner, of course, might make a regulation as to the manner of making a return; the form which that return shall take, and provide the necessary blanks and the affidavits, and all that sort of thing, but he could not add one jot or tittle to the terms of that statute, if he were to regulate from now until doomsday. So, the only question here is really a question of whether that statute means, that under this contract and this course of dealing now stipulated, the Government had the right to exact these payments. But proceed; I will hear it.

Mr. WHITE. I think your honor has the situation sized up just as we view it.

Q. Mr. Johnson, from your experience, covering the length of time mentioned, in the railroad business, is the transmission of messages by wire a necessary prerequisite to the successful conduct and handling of trains in the operation of a railroad?—A. Absolutely.

Q. What are the regulations referred to by you, of the Commissioner of Internal Revenue, with reference to a tax upon the transportation made by the common carrier, the railroad company, for the benefit of the Western Union under this contract?

Mr. HENDLER. That is objected to——

The COURT. I do not see the competency of it now, Mr. White.

(Here ensued colloquy between the court and counsel.)

By Mr. WHITE:

Q. Mr. Johnson, you have been familiar with this contract with the Western Union since it was executed in 1911, have you not?—A. Yes, sir.

Q. It embraces the performance of a great many reciprocal acts, does it not—— A. Yes, sir.

Q. Between the two companies?—A. Yes, sir.

Q. The railroad company granted to the Western Union the right to stretch its wires upon their poles, and granted them title to the poles and a certain portion of the right of way?—A. Yes, sir.

38 Q. And they were given the right to operate, for commercial purposes, in the stations of the railroad company?—A. Yes, sir.

Q. The railroad company was to have ten per cent on all business realized from the commercial use of the wires?—A. Yes, sir.

Q. A reciprocal obligation with reference to the transportation of the men and property, in the contract, contained the clause that the railroad company will have the right to the transmission of messages at regular commercial rates, aggregating the sum of seventy-five thousand dollars per year, and the railroad company was to transport the men and property of the telegraph company at regular prices, up to that amount?—A. Yes, sir.

Q. Explain to the court how you kept the accounts of the different parties to that contract, covering the transportation by the railroad company, and the transmission of messages by the Western Union that are to be franked, under that contract.—A. So far as the transportation of men and material was concerned, our office kept a record of all of the transportation furnished to the telegraph company. At the end of the contract year statements were made setting forth the transportation furnished, and those statements were delivered to the Western Union. After they were verified by the Western Union they became the basis for settlement under the contract. A similar arrangement was made by the Western Union Telegraph Company.

Q. After you received the amount of the frank messages which had been sent by the officers and agents of the railroad company, if those messages did not aggregate over seventy-five thousand dollars a year, were there any payments made for those messages?—A. No, sir.

Q. Did the Western Union Telegraph Company, during any of these years involved here, pay the Missouri Pacific Railroad Company for any transportation charges aggregating up to seventy-five thousand dollars?—A. No, sir.

Q. Then, in your method of accounting you utilized the regular transportation charges for the transportation of the railroad company and the Western Union Company simply for the purpose of ascertaining when the aggregate was reached?

Mr. HENDLER. We object to the purpose; we are not concerned with the purpose. Your honor is only concerned with the fact.

39 The COURT. Yes; I will determine the purpose. You may elicit the facts from him, however.

Mr. WHITE. Q. Were there any payments in cash, or its equivalent, actually transferred from the railroad company to the telegraph company within the seventy-five thousand dollar limit?

A. No, sir.

The COURT. Let me understand that, now.

Q. You mean that for none of these years the services rendered by the telegraph company to the railroads, nor the services rendered by the railroads to the telegraph company exceeded seventy-five thousand dollars?—A. No, sir; I don't mean that. I mean that no payments were made up to seventy-five thousand dollars. The only payments made were those in excess of seventy-five thousand dollars.

Q. I understand that, but I thought you had said that for the years involved here no payments were necessary, because it did not amount to seventy-five thousand dollars. Did it amount to more than that?—A. Yes, sir.

The COURT. Very well.

Mr. WHITE. You have a statement, Mr. Johnson, have you not, of the extent of the transportation for these years?

A. I have.

Q. I will have that identified, and you can then explain that. We will mark that "Plaintiff's Exhibit No. 1." (See last page.)

The COURT. Can we not agree upon that, that for a certain year the excess over seventy-five thousand dollars was in favor of the telegraph company, or the railroad company, as the case may be, and amounted to so many dollars? That is all I have to know.

Mr. WHITE. He has the statement right there.

Mr. HENDLER. We have tried to stipulate everything that was before us——

The COURT. I thought perhaps we might greatly shorten it. It may not become pertinent to know that, but on the other hand, it might be, on the theory that if you did not get all your credit in there might be a reduction one way or the other.

40 Mr. WHITE. For the years covered by the taxes here, what was the extent of the business handled by both the Western Union and the Missouri Pacific Railroad Company?

A. For the contract year ended August 31, 1920, the total amount of business handled by the Missouri Pacific Railroad Company for the Western Union amounted to $81,165.28.

Q. That was business that the Missouri Pacific transported for the Western Union?—A. Yes, sir. After this statement was submitted to the Western Union they made adjustment in it amounting to $443.56, so that the net amount of business handled for the Western Union for that year was $80,721.72, or $5,721.72 in excess of the seventy-five thousand dollar allowance under the contract. During the same year the amount of business handled by the Western Union for the Missouri Pacific Railroad Company was $71,815.17. That was $3,184.83 less than the amount provided for under the contract.

and for that year there was no payment made by the Missouri Pacific to the Western Union Telegraph Company.

Q. How is the next year?—A. The year ending August 31, 1921, the net amount of business done by the railroad company for the telegraph company was $144,023.95. This was $69,023.95 in excess of the seventy-five thousand dollars. During the same year the business handled by the telegraph company for the railroad company amounted to $86,221.92, or $11,221.92 in excess of the contract allowance. During that year the Western Union Telegraph Company paid the railroad company the difference between $69,023.95 and $11,221.92, or $57,802.03.

Q. Does that bring it down to January 1st?—A. No, sir. For the year ended August 31, 1922, the net amount of business handled by the railroad company for the telegraph company was $132,349.02, or $57,349.02 in excess of the contract; while the amount of business handled by the telegraph company for the railroad was $83,342.17, or $8,342.17 in excess of the contract. And that year the telegraph company paid the railroad company the difference between $57,349.02 and $8,342.17, or $49,006.85. That brings us down to the contract year ending August 31, 1922.

Q. Mr. Johnson, has the Government collector of internal
41 revenue ever made any demand upon the railroad company for taxes due upon any transportation service rendered to the Western Union Telegraph Company?

Mr. HENDLER. That is objected to. We are not concerned here with the taxes on the other end of this transaction. This is a suit to recover for the transmission taxes.

The COURT. I understand the question has reference to whether the collector has tried to collect from the Western Union now what I may call a reciprocal tax?

Mr. WHITE. Yes.

The COURT. I do not think that has anything to do with it.

(Here ensued colloquy between the court and counsel.)

The COURT. I shall overrule the objection and hear it.

To which ruling of the court the defendant, by his counsel, then and there at the time duly executed.

By Mr. WHITE:

Q. Read the regulation of the Commissioner of Internal Revenue with reference to the exception of the Government tax put upon transportation rendered by common carriers to other common carriers and to telegraph companies.—A. This exception is embodied in Regulation No. 49, issued by the Internal Revenue Department in 1920. Section 501, article 46, paragraph C, shown on page 27 of the printed pamphlet: "If a telegraph or telephone line or lines along the line of any railroad company be necessary for the use of such railroad company in the conduct of the railroad company's business as such, and if the railroad company under contract transports commodities necessary to maintain or operate such telegraph or telephone

line or lines along the line of such railroad company, such commodities being intended to be or having been so used, and the railroad company makes no charge for such transportation, the charges which, but for such arrangement, would have accrued upon such transportation, are exempt from the tax."

Q. Now, Mr. Johnson, similar contracts to that obtaining here you know from your general information as an auditor for so many years are made by the Western Union Telegraph Company with all the railroad companies in the United States or a great many
42 of them?—A. I know that there are similar contracts to ours made with other railroad companies.

Mr. WHITE. You may inquire.

Cross-examination by Mr. HENDLER:

Q. This statement, I notice, Mr. Johnson, is rendered in dollars and cents?—A. Yes, sir.

Q. The statements are mutually rendered by the telegraph company and the railroad company. Now that, I take it, in each case represents the usual and ordinary charges, on the one hand, of the railroad company for transportation of passengers and commodity transportation and, on the part of the telegraph company, of its tariff rates?—A. It does.

Q. The railroad company appears to have been the fortunate contractor during these years?—A. The business of the railroad company exceeds the business of the telegraph company.

Mr. HENDLER. I believe that is all.

The COURT. I want to ask if it is not a fact that during the period embraced in the suit here there was a tax levied on passenger tickets and freight——

Mr. WHITE. Yes.

Mr. HENDLER. Yes, your honor.

The COURT. That was what I had reference to a moment ago when I used the word "reciprocal."

Mr. HENDLER. There is another point that might give your honor some concern when you come to consider the case. I thought you had that in mind when you started to speak. None of this tax covers the period when the railroads were in the hands of the director of railroads. It begins with March of 1920, the date when the railroads were returned to their owners.

The COURT. The first day of March, 1920, when the transportation act took effect?

Mr. HENDLER. No; but it was then the railroads were turned back to the corporations by the director.

The COURT. I get that.

43 Mr. HENDLER. So your honor need not concern yourself at all as to that question of Government control and operation.

The COURT. Very well. Is there any further evidence?

Mr. HENDLER. No; that concludes the evidence.

Which was all of the evidence offered at the trial.

Thereupon counsel made their oral arguments to the court, and the case was submitted to the court and by the court taken under advisement, counsel for the respective parties being permitted to file briefs if they so desire.

MEMORANDUM OPINION, APRIL 4, 1925

FARIS, J.: This case was heretofore submitted to the court, sitting as a jury (waiver of a jury having been formally made by stipulation), upon an agreed statement of facts, plus certain oral evidence, that it was agreed might be offered by either side. Some such evidence was offered by the plaintiff. But this oral evidence, in my opinion, was not such as to change or alter the evidentiary situation therefore created by virtue of the stipulated facts.

I therefore find the facts to be as set out in the agreed statement of facts, and upon these facts I conclude, as a matter of law, that the judgment should be for defendant and against plaintiff; that plaintiff take nothing by its said suit herein, and that defendant go hence without day.

So much is ruled in order to form if possible a legal basis for review, if plaintiff is so advised, absent, as here, any other requested method of procedure.

Having performed this duty to the extent stated, I think that some hasty expression, at least, of my views ought, in candor,
44 to be set out so that counsel may be afforded the legal reasons held in mind for the bald conclusion thus announced.

The petition in the case is in two counts. The first count asks for a return or refunding of $10,036.85, paid under protest by plaintiff to the defendant as collector of internal revenue of the United States for the first district of Missouri, for taxes on messages sent by plaintiff on Western Union Telegraph Company franks between the first day of March, 1920, and the first day of July, 1922.

The second count is in all respects similar, except that it prays the refunding and return of the sum of $4,756.10 paid under protest for taxes on similar messages sent by plaintiff between the first day of August, 1922, and the first day of January, 1923.

The statutes which control are sections 500, 501, and 502 of the revenue act of 1918, and sections 500, 501, and 502 of the revenue act of 1921. The difference between the two acts are perhaps such as to affect in no substantial way the law of the case, although sections 500, 501, and 502 of the revenue act of 1918 were wholly repealed by the act of 1921. By this repeal subdivision (c) of section 501 was eliminated from the statute and it does not apply, therefore, to so much of the taxes collected as were bottomed on messages sent after January 1, 1922. But I am not able to construe subdivision (c) of said section 501 of the act of 1918 as at all applicable to the facts in this case. The words "commodity" and "material" as used in said subdivision (c) in my opinion include goods, wares, merchandise, or freight commonly so called only in contradistinction

to telephone and telegraph conversations and messages. Even if this view were not fully sustained by the language used and the context in which this language is found, and I think it is, great weight is lent to it by the fact that subdivision (c) of section 501 was repealed when the taxes on freight and express shipments were repealed, as they were by the act of 1921.

Upon the agreed facts subdivision (c) of section 501 of the act of 1918 applied in no event to but a part only of the taxes mentioned in the first count and to none of those mentioned in the second count. I construe this language as not applying at all to the facts before me, and so no further attention need be given to it.

45 The plaintiff, on October 24, 1911, and long before the passage of the revenue act of 1918, made a contract with the Western Union Telegraph Company whereby, up to the sum of seventy-five thousand dollars per year, the telegraph company agreed to transport on franks telegraph messages, on or off line, for the plaintiff, in and about plaintiff's business as a common carrier. In consideration for this service the plaintiff agreed to transport freight and passengers for the telegraph company by franks and free passes up to the amount of seventy-five thousand dollars per year.

For all services rendered by either party to the other, above the value of seventy-five thousand dollars per year, payments are, by the terms of this contract, reciprocally exacted in cash. For all the years involved here the telegraph company has paid, in cash, to the plaintiff substantial sums for services rendered by it in carrying freight and passengers, whereof the sum of the rates and fares exceeded seventy-five thousand dollars per year.

As forecast, all messages sent and all freight and passengers carried by plaintiff and the telegraph company were charged for and accounted for, but no payments were actually exacted or made, except for sums in excess of seventy-five thousand dollars per annum. These charges were bottomed on the usual rates charged to the public generally. If there were no rates to govern, the actual cost of the service, plus not more than twenty-five per cent, was charged.

Upon these facts plaintiff contends that section 500 of the revenue act of 1918, which, as said, is substantially similar to section 500 of the act of 1921, either has no application or, by said section and others mentioned, it is exempted from taxes.

This section, so far as pertinent, provides thus:

"Section 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the tax imposed by section 500 of the revenue act of 1917 • • • (f) In the case of each telegraph, telephone, cable, or radio dispatch, message, or conversation, which originates on or after such date, within the United States, and for the transmission of which the charge is more than fourteen cents and not more than fifty cents, a tax of five cents; and if the charge is more than fifty cents, a tax of ten cents; provided, that only one payment of such tax shall be required,

46 notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation; and

(g) A tax equivalent to ten per centum of the amount paid after such date to any telegraph or telephone company for any leased wire or talking circuit or special service furnished after such date. This subdivision shall not apply to the amount paid for so much of such service as is utilized (1) in the public press or (2) in the conduct by a common carrier or telegraph or telephone company of its business as such."

All of the taxes here sought to be recovered by the plaintiff were exacted by defendant under the provisions of subdivision (f), supra, and accrued, as to the sum total of the taxes levied on the messages, as per the rates in such subdivision provided. If the plaintiff had made a contract with the telegraph company by which it leased wires of the latter upon a rental basis, then it may well be that the tax of ten per cent levied by subdivision (g) in such case would not apply. But by the very terms of the latter subdivision both the taxes and the exemptions therein provided for are confined to that subdivision only and the taxes here in dispute did not accrue under subdivision (g).

The result is that if plaintiff is included as taxable upon the agreed facts when the provisions of subdivision (f), supra, are applied to these taxes, then I am forced to the view that there are no provisions exempting plaintiff from such payment by reason of the fact that it is a common carrier and telegraph service is necessary for the carrying on of its business as such.

All, then, that is left of the case is the question of whether the agreed facts bring the plaintiff within the provisions of subdivision (f) of section 500 of the revenue act of 1918.

Clearly, plaintiff got this service, and for this service the usual charge was made by the telegraph company; or, to put it another way, an account was kept of the service, based upon the usual charge therefor, which the public would have had to pay. Plaintiff did not pay cash or in money for this service, at least up to the sum of a total of seventy-five thousand dollars, but it paid in kind; that is, it rendered freight and passenger transportation service to the telegraph company in exchange for telegraphic service rendered
47 by the latter, until the plaintiff had thus swapped or bartered with the telegraph company seventy-five thousand dollars' worth of service. Above this amount of credit or of service to be paid for in service the transactions on the part of both companies with each other were in effect in no wise different from similar sales of service by either company to the general public.

Below the annual sum total of seventy-five thousand dollars, the transaction as said was one of barter, or mutual swapping of service. Of course, a situation could have arisen wherein the plaintiff would have been the loser, because it paid in kind for more service than it got. If, for example, plaintiff had carried for the telegraph

company in any one year freight and passengers the carriage of which, at the usual rates and fares, amounted to seventy-five thousand dollars, while it only sent on its own affairs telegraph messages amounting to fifty thousand dollars, say, it would have paid a largely excessive rate for these messages, and would have sustained a loss of twenty-five thousand dollars. This, as it happened, never occurred at any time within the period embraced in this controversy; but, of course, it could have happened. The moment the credit of seveny-five thousand dollars was exhausted, the transactions, as has been seen already, differed in no substantial way from sales of service, by either company, to the general shipping and traveling public, except, it may be assumed, the latter paid cash at or before the rendition of the service, while plaintiff either paid, or was paid, at the end of the contract year. Since such services were thus mutually paid for to each other by the plaintiff and the telegraph company, does the fact that such payments were, within limits, made in kind, by a swapping of service, prevent them from being services rendered for hire within the purview of subdivision (c) of section 501 of the revenue act of 1918, by which part of this case is governed? I do not think so.

Congress might have exempted from taxes such service so compensated, but I am not able to see that it actually did so. Nor does the fact that under the contract here a situation could have arisen (but, fortuitously, did not in this case), wherein the plaintiff might have rendered much service for which it got no pay, serve to render the plaintiff exempt from taxes, or to take it out of the provisions of subdivision (f) of section 500. This, I think, is obvious, for the reason that the agreed amount of seventy-five thousand dollars' worth of free service, or bartered service, is merely arbitrary,
48 and if the fact that the mere fixing of an arbitrary amount of free service could serve of itself alone to take plaintiff out of the statute, the anomalous situation would present itself whereby plaintiff, by a mere contract with another carrier, would be able to avoid the payment of taxes to the Government. Certainly the Congress could not have intended to have put it in the hands of plaintiff to become a taxpayer or not a taxpayer, according to the terms of a bad contract which plaintiff might enter into.

I reach this conclusion without definite reliance upon the case of Telegraph Company vs. Delaware, etc., Railroad Company, 282 Fed. 925, wherein substantially a similar view was taken; as, also, without any reliance upon the regulations adopted and promulgated by the Commissioner of Internal Revenue in Regulation No. 57, which regulation is set out in the agreed statement of facts.

If a fair legal construction of these statutes which are involved here does not bring the plaintiff into the category of those from whom taxes are exacted, then, of course, it is elementary that no regulation of the Commissioner of Internal Revenue would serve to perform this office. In short, the Commissioner of Internal Rev-

enue has no power, by a mere regulation, to make plaintiff's transactions taxable if they are not taxable by the statute itself. But if the Commissioner of Internal Revenue has by this regulation correctly construed these statutes, then the fact that he did so by language a little less involved and cryptical, and more easily understood than the statutes themselves, does not serve to make this regulation bad.

I am compelled, therefore, against views tentatively held upon argument of the case, to agree that plaintiff is taxable; that the taxes paid were legally exacted, and that it ought not to recover. The finding and judgment, therefore, will be for defendant, as already said in the finding of fact and conclusion of law.

This oral opinion may be filed by either party in the case, and exceptions are allowed to plaintiff, both to the views expressed herein, as well as to the conclusions of law and fact with which I began.

ST. LOUIS, MISSOURI, *April 4, 1925.*

49 JUDGMENT

In accordance with the above finding the court entered judgment in favor of defendant, to which finding and judgment plaintiff at the time duly excepted.

And thereafter, to wit, on the eighth day of April, 1925, plaintiff filed its motion for new trial, which motion is in words and figures as follows, to wit:

[Motion for new trial, omitted; printed side page, ante.]

MINUTE ENTRY OF ORDER OVERRULING MOTION FOR NEW TRIAL

And thereafter, to wit, on the twelfth day of June, 1925, the foregoing motion for new trial was by the court overruled, to which action of the court the plaintiff, by its counsel, then and there, at the time, duly excepted.

50 In United States District Court

Order settling bill of exceptions

Forasmuch, as said matters do no appear of record herein, the plaintiff has prepared and now presents this, its bill of exceptions, and prays that the same may be signed, sealed, and made a part of the record, which is accordingly done on this 9th day of July, 1925.

(Signed) C. B. FARIS, [SEAL.]
Judge, Eastern Division of the Eastern Judicial District of Missouri.

Approved by:
(Sgd) CLAUDE M. CROOKS,
Counsel for Defendant.

51-52 PLAINTIFF'S EXHIBIT 1

Missouri Pacific Railroad Company—Yearly settlements with Western Union Telegraph Co. under record #8350 effective September 1, 1911

Year ended	Mo. Pac. Bills vs. Western Union for transportation charges	Western Union counter-billing vs. Mo. Pac.	Net transportation charges	Annual allowance provided by contract	Excess transportation charges	Western Union telegraphing charges vs. Mo. Pac.
Aug. 31, 1920	$91, 165. 28	$443. 56	$90, 721. 72	$75, 000. 00	$5, 721. 72	$67, 443. 38
" " 1921	147, 127. 51	3, 103. 56	144, 023. 95	75, 000. 00	69, 023. 95	96, 221. 93
" " 1922	141, 275. 70	8, 924. 68	132, 349. 02	75, 000. 00	57, 349. 02	83, 343. 17

Year ended	Allowances in A. R. T. Co.	Total telegraphing charges	Annual allowance provided by contract	Excess telegraphing charges	Bills versus Western Union covering difference excess telegraphing and excess transportation		Date paid
Aug. 31, 1920	$6, 371. 79	$71, 815. 17	$75, 000. 00	$3, 184. 83	31453-23	$5, 721. 72	July 26, 1923
" " 1921		96, 221. 93	75, 000. 00	11, 221. 93	111529-22	57, 903. 05	Apr. 14, "
" " 1922		83, 343. 17	75, 000. 00	8, 343. 17	160771-23	49, 000. 85	Oct. 15, "

War tax paid under protest:

March, 1920, to July, 1922	$10, 036. 85
Aug., 1922, to Jan., 1923	4, 756. 10
	14, 792. 95
Penalty	50. 00
	14, 842. 95

ACCOUNTING DEPARTMENT,
ST. LOUIS, MO., *December 20, 1924.*

53 In United States District Court

Praecipe for transcript of record

Filed July 20, 1925

To James J. O'Connor, clerk, United States District Court:

You are hereby notified that the plaintiff in the above-entitled cause, in which a writ of error has been issued to the United States Circuit Court of Appeals for the 8th Judicial Circuit, desires to file in said Court of Appeals a typewritten or manuscript transcript containing the following documents and proceedings in said cause, to wit:

1. Petition.
2. Answer.
3. Stipulation waiving jury.
4. Bill of exceptions showings proceedings in trial of the cause.
5. Record entries of judgment; order overruling motion for new trial; order granting writ of error; order granting time to file bill

of exceptions and order showing filing of same; and order approving bond.

6. Petition for writ of error.
7. Assignment of errors.
8. Writ of error and your return to same.
9. Citation.
10. Bond.
11. Praecipe for transcript and certificate of clerk to transcript.

You are further notified that plaintiff elects to have transcript of the record printed under the supervision of the clerk of said Court of Appeals, under its rules, and requests that you make and have filed in said Court of Appeals said transcript here requested, in accordance with the rules of said Court of Appeals.

(Signed) EDW. J. WHITE,
M. U. HAYDEN,
JAMES F. GREEN,
Attorneys for Plaintiff.

54 Copy of above praecipe received July 20th, 1925.
(Signed) CLAUDE M. CROOKS,
Atty. for Deft.

[Clerk's certificate to foregoing transcript omitted in printing.]

55 [Appearances of counsel omitted in printing.]

56 [Minute entry of argument and submission Jan. 22, 1926, omitted in printing.]

57 In United States Circuit Court of Appeals, Eighth Circuit

No. 7129—December term, A. D. 1925

MISSOURI PACIFIC RAILROAD COMPANY, plaintiff in error vs. ARNOLD J. HELLMICH, UNITED STATES collector of internal revenue, defendant in error	In error to the District Court of the United States for the Eastern District of Missouri

Mr. James F. Green and Mr. Edward J. White (Mr. M. U. Hayden on the brief), for plaintiff in error.

Mr. Charles T. Hendler, special attorney, Internal Revenue (Mr. Allen Curry, U. S. attorney, Mr. Claude M. Crooks, assistant U. S. attorney, and Mr. A. W. Gregg, Solicitor of Internal Revenue, on the brief), for defendant in error.

Before STONE, VAN VALKENBURGH, and BOOTH, Circuit Judges.

Opinion

Filed April 28, 1926

VAN VALKENBURGH, Circuit Judge, delivered the opinion of the court.

The revenue act of 1918, among other things, provided:

"Sec. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid in lieu of the taxes imposed by section 500 of the revenue act of 1917:

* * * * * * *

58 "(f) In the case of each telegraph, telephone, cable, or radio, dispatch, message, or conversation which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of 10 cents; provided, that only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation.

"Sec. 501. (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * * * *

"(c) The taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. * * * Nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transportation of any commodity which is necessary for the use of the carrier in the conduct of its business as such and is intended to be so used or has been so used; or (2) upon the transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier which is also a part of the same system.

* * * * * * *

"The returns required under this section shall contain such information and be made at such times and in such manner as the commissioner, with the approval of the secretary, may by regulation prescribe."

The Commissioner of Internal Revenue prescribed the following regulations deemed pertinent to this inquiry. Article 9 of Regulations Numbered 57:

"Messages transmitted under contract.—Where by contract a telegraph, telephone, radio, or cable company agrees, in consideration of the payment of a lump sum or of the performance of services, to transmit messages on frank, such messages are subject to the tax imposed by this section (500-f of the act). The tax on each such message is to be computed upon the amount of the regular established charge for the transmission of similar messages for ordinary cus-

tomers, calculated at the regular fixed rate provided in the
59 tariffs of the transmitting carrier. The questions as to whether such messages relate to the operation of the business of the common carrier and whether they are 'on-line' or 'off-line' are immaterial. Thus a telegraph company agrees to transmit over its lines on a railroad line all messages relating to railroad business 'free,' and all such messages over its lines off the railroad line 'free' to an amount not exceeding ten thousand dollars ($10,000.00) per year, calculated at its regular rates, and all messages over that amount at half rates in consideration of services to be performed by the railroad in the transportation of men and materials of the telegraph company. All such messages, whether 'on-line' or 'off-line' and whether 'free' or at half rates, are subject to the tax provided by this section (500-f) of the act. The tax must be computed, collected, and paid upon each such message."

Regulation No. 49, issued by the Internal Revenue Department in 1920:

"If a telegraph or telephone line or lines along the line of any railroad company be necessary for the use of such railroad company in the conduct of the railroad company's business as such, and if the railroad company, under contract transports commodities necessary to maintain or operate such telegraph or telephone line, or lines, along the line of such railroad company, such commodities being intended to be, or having been so used, and the railroad company makes no charge for such transportation, the charges which, but for such arrangement, would have accrued upon such transportation, are exempt from the tax."

On the 24th day of October, 1911, the Western Union Telegraph Company and the predecessors of plaintiff in error, all common carriers engaged in interstate commerce and subject to the act of Congress to regulate interstate commerce, entered into a written contract, the material parts of which are as follows:

"The telegraph company agrees to perform such telegraphic service between points on its lines in the United States, either on or off the lines of the railroad covered by this agreement, as the railway companies may desire, for messages pertaining to their railroad business, to be authorized by frank permitting all classes of messages and telegraphic letters in public use on the lines of the telegraph company to be issued to such officers and agents of the railway com-
panies as may be designated by their presidents or general
60 managers; and the railway companies agree to perform promptly such transportation and distribution service over their railroads covered by this agreement as the telegraph company may require for its employes, supplies, and material, whether for work or use along said railroads or beyond or off the lines of said railroads, and to furnish special trains, engines, crews, and equipment for distribution service, and outfit, boarding, and tool cars for work on the lines along said railroads whenever required by the telegraph company. The transportation of employes to be author-

ized by passes to be issued by the railway companies on request of the superintendent or other authorized officer of the telegraph company.

"Such service performed by either party for the other shall be charged for at its or their regular current telegraph rates, or through or local transportation rates, as the case may be, for the class of service rendered. Services performed by either party for the other for which there are no regular or published rates, and not otherwise provided for in this agreement, shall be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding twenty-five per cent (25%) of such cost. At the close of each contract year bills shall be rendered by each party to the other for all services performed by either party for the other during the year. If such bills therefor, rendered by either party to the other, exceed the sum of $75,000 in any contract year, the party receiving such service shall pay to the party rendering the same the amount of such excess, provided, that, in the event that each of the parties hereto is rendered bills for such services in excess of $75,000 in any contract year, the party in arrears shall pay to the other party the difference between the amounts of such accounts; and further provided that if the bills rendered by either party to the other for such services in any contract year do not exceed $75,000, there shall be no payment by either party to the other therefor."

This contract was in full force and effect between plaintiff in error and the telegraph company at the time of the enactment of the revenue act of 1918, to which reference has been made.

The interstate commerce act which forbids any common carrier subject to its provisions, directly or indirectly, by any special rate, rebate, drawback, or other device, to charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered than it charges, demands, collects, or
61 receives from any other person or persons, for a like service, provides further that, "nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services." Section 8569, Compiled Statutes of the United States, 1916.

The arrangement made by the contract of October 24, 1911, although an apparent departure from the provisions of the original act against granting special rates or charges, was thus recognized by Congress and approved by the Supreme Court, for the reason that the interdependence of such companies is very intimate. The railroads and the telegraph companies have grown together in mutual dependence; each is necessary to the other. The bargain between them is a very complex one and all the benefits derived on one side, including those of a pecuniary nature, form the consideration for all the benefits conferred upon the other. Postal Tel.-Cable Co. v. Tonopah R. R. Co., 248 U. S. 471.

Defendant in error made demand upon plaintiff in error in May and June, 1923, for taxes claimed to be due on account of franked

Western Union messages transmitted during the period from March, 1920, to January, 1923, inclusive, aggregating $14,792.95. These taxes covered all messages sent, including the free service provided by the contract. Plaintiff in error paid these sums under protest, the sufficiency of which is conceded, and thereafter, in March, 1924, brought suit for the recovery thereof. It is agreed that plaintiff in error duly appealed to the Commissioner of Internal Revenue for refund, and that the commissioner failed to render any decision or make any response to such appeal for more than six months after the same was presented to him. It is further agreed that if the court should find for the railroad company, judgment should be rendered in its favor for the sums claimed, to wit, $14,792.95. Upon submission to the court, on stipulation of parties waiving a trial by jury, a judgment was rendered in favor of defendant in error.

Plaintiff in error urges that the revenue act of 1918, and the interstate commerce act above quoted are in pari materia, and that the latter should be considered as governing the application of the former. To this we cannot agree, because the two acts do not deal with the same subject-matter. The parties are the same, but the subject matter in the one case is taxation--in the other, a regula-
62 tion and control of carriers. The latter act differentiates carriers from ordinary shippers permitting contracts for exchange service. The language of this court in United States v. Railroad, 157 Fed. 321, is conclusive upon this question. Nevertheless the commerce act is instructive and pertinent as revealing the attitude of the Government toward contracts of this nature.

We also agree with the trial court that Regulation No. 57 has no force as creating a tax. That regulation is powerless to enlarge the act. We may also concede the general rule that long interpretation of a statute by an executive department charged with its enforcement is entitled to weight, and that under some circumstances a subsequent enactment without change has been held to indicate approval of prior administrative construction and interpretation; but this rule would apply equally to Regulation No. 49, whereby the telegraph company is, by interpretation, exempted from tax where the railroad company, under contract, transports commodities necessary to maintain or operate such telegraph lines along the line of the railroad company, on the ground that the railroad company makes no charge for such transportation. In this respect, in our opinion, the interpretations disclosed by these two regulations are inconsistent. In this view, it is improbable that Congress had this feature in mind at all when it passed the later act of 1921, for certainly it can not be said that the railroad did not charge for the transportation in the same sense as the telegraph company did for the messages. The situation presented is similar to that before the Supreme Court in George Iselin v. United States, decided March 1, 1926, — U. S. —, in which it was held that such departmental construction can not be given the force and effect of law.

The real question is, did these messages upon which the tax was based come within the intendment of subdivision (f) of section 500 of the act of 1918? If we adhere strictly to the technical meaning of the language used, we might answer in the affirmative; but this law, as all others, must be construed in the light of the true intent, object, and purpose of the legislation. It was not intended thereby to tax any service of this kind which was not rendered for hire; that is to say, for a return either in money or property. In other words, the term charge as used in the act is not a mere bookkeeping term. It means a return in tangible value, measured in money, according to the nature, length, and destination of the message. It is so used in Regulation 49. When we say "we make no charge" we mean "we exact no payment."

63 This contract contemplated no payment at all for mutual services up to $75,000. The payments contemplated were upon the excess, or balance of excess, above $75,000. The charge on the books, in terms of dollars and cents, as applied to individual messages (and, of course, corresponding charges were made on the books of the railroad company for transportation furnished), was simply to keep a record for the purpose of ascertaining whether any chargeable excess should come into existence against either party to the contract. This appears from the annual settlements made. For the year ending August 31, 1920, the net transportation charges of the railroad against the telegraph company were $80,721.72. The total telegraphic charges for services furnished by the Western Union Company were $71,815.17. The excess of transportation charges over the free carriage allowed up to $75,000 was $5,721.72; but the excess of railroad service over telegraph service was $8,906.55. If the whole volume of service was subject to payment, settlement being made on general balances, the railroad should have demanded and received $8,906.55, but instead, in accordance with the terms of the contract, it received but $5,721.72. In other words, on each side, service up to $75,000 was free to be used or not used as desired. There was no purpose to charge for it. The fact that where mutual services were actually rendered in excess of $75,000 an appearance of payment, dollar for dollar, is presented, furnishes no controlling guide to ascertainment of the nature of the transaction. The consideration in this contract was not the reciprocal services themselves, on an established tariff basis, but the privilege or option to receive $75,000 worth of free service, should either or both so elect. If each party was, in effect, to charge at the tariff rates for all services without franking privileges, no contract would have been necessary.

This contract was made in 1911 before either the war or this war tax was thought of. It is in no sense self-serving nor designed to defeat the revenue. As said in Postal Telegraph-Cable Company v. Tonopah R. R. Company, supra, contracts of this nature have been nearly universal for fifty years. The apprehension that they can be employed at will to accomplish immunity from taxation is groundless. When the act was passed Congress could have expressly pro-

vided against such a result if it had been deemed necessary, or if such abuse should creep in, it can at any time be met by appropriate legislation. The trial court was admittedly in doubt on the
64 question. It was finally controlled by the view that the contract involved a swapping of services, which, therefore, were for hire; but the contract up to $75,000 was a swapping of privilege rather than of service, and the mutual service up to that limit was free. This is demonstrated by the contemplated operation. If the railroad had handled no shipments for the telegraph company, but had sent messages not exceeding $75,000 in value, it would have paid nothing, and the telegraph company would have received nothing, although the latter would have rendered $75,000 worth of service and would have charged that amount on its books. The Government seeks to convert a mere bookkeeping fiction into an item of income; but this is not permissible. The transaction must be viewed in its substantial and not in its purely technical aspect. Messages up to the amount of $75,000 did not constitute services rendered for hire, and are, therefore, exempt; those in excess of that amount are subject to tax. The case is reversed and remanded with directions to apply this rule. It is so ordered.

65 In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted.]

Judgment

April 28, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, reversed with costs; and that the Missouri Pacific Railroad Company have and recover against Arnold J. Hellmich, United States collector of internal revenue, the sum of ——— dollars for its costs in this behalf expended, to be collected according to law.

And it is further ordered and adjudged that this cause be, and the same is hereby, remanded to the said district court, with directions to apply the rule announced in the opinion of this court that messages under the contract between the Western Union Telegraph Company and the railroad company up to the amount of seventy-five thousand ($75,000.00) dollars did not constitute services rendered for hire and are, therefore, exempt, and those in excess of that amount are subject to tax.

66 [Clerk's certificate to foregoing transcript omitted in printing.]

1Y Supreme Court of the United States

Order allowing certiorari

Filed October 18, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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